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Supreme Court, U.S.
FILED
DEC 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-537

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAFEH E. PENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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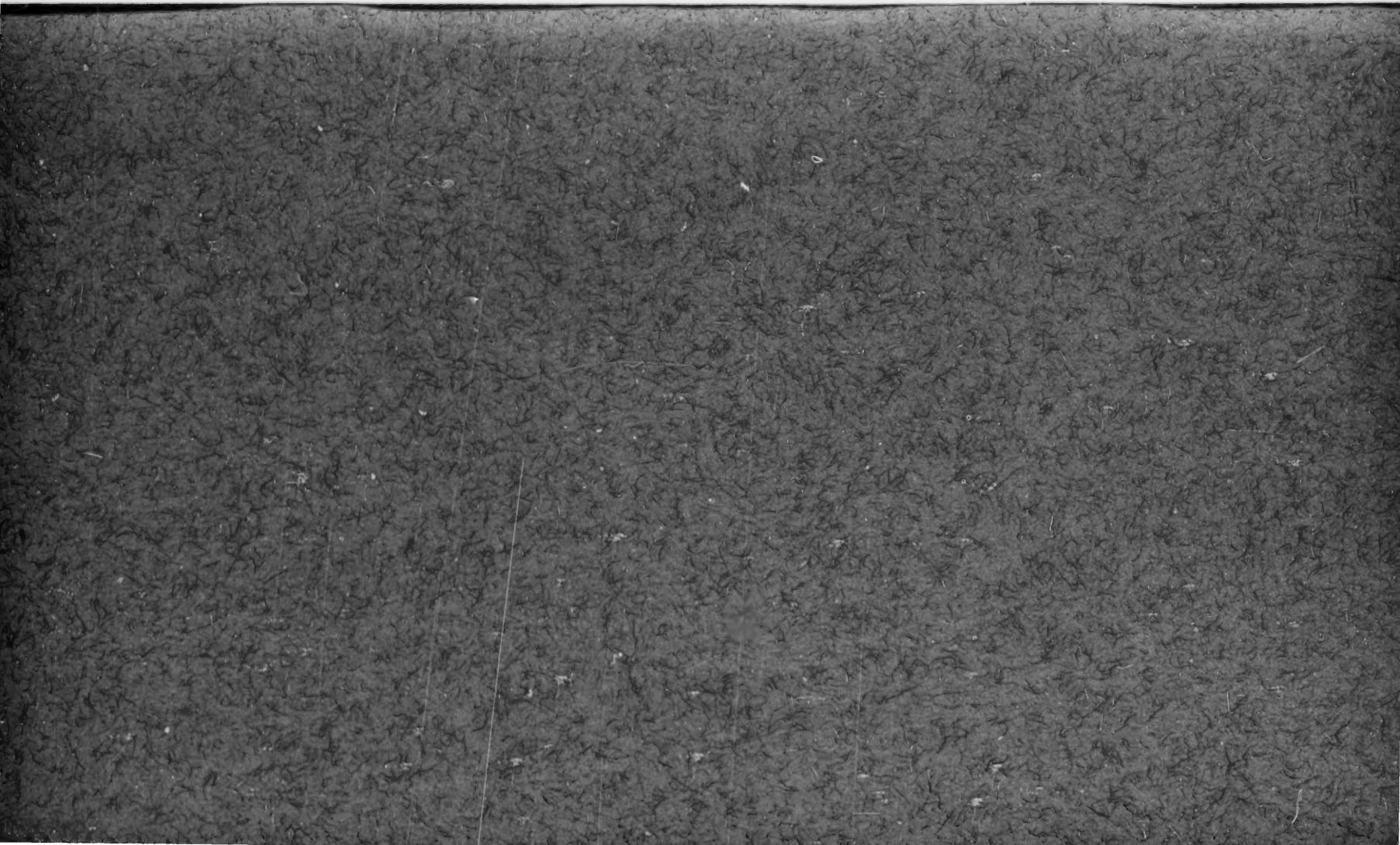

QUESTION PRESENTED

Whether the tape-recorded drafts of agents' reports are "statements" of the agents within the meaning of the Jencks Act, 18 U.S.C. 3500, and whether petitioner was prejudiced by the government's failure to preserve those recordings and produce them for his use at trial.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-5a) is reported at 22 M.J. 281. The opinion of the Army Court of Military Review (Pet. App. 6a-7a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 4, 1986. The petition for a writ of certiorari was filed on October 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

1. Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Belvoir, Virginia. At the conclusion of trial, he was convicted of possessing and distributing cocaine on October 8, 1982, and possessing cocaine on October 29, 1982, with intent to distribute it, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to 18 months' confinement and a reduction in rank. The convening authority reviewed the case and approved the findings and sentence. On February 9, 1984, the Secretary of the Army remitted the unexecuted portion of the sentence to confinement and granted petitioner an administrative discharge. The Army Court of Military Review dismissed the possession specification of the first charge as multiplicitous, but it affirmed the remaining findings and sentence (Pet. App. 6a-7a). The Court of Military Appeals affirmed the decision of the Court of Military Review (Pet. App. 1a-5a).

2. On October 8, 1982, petitioner sold a quantity of cocaine to a confidential informant of the Fort Belvoir Drug Suppression Team (Tr. 574-576, 650-651). Petitioner was arrested three weeks later by Criminal Investigation Division (CID) Special Agents Henry Mungle and David Cornelius (Tr. 681). A search incident to that arrest revealed petitioner to be in possession of 20 tinfoil packets of cocaine (Tr. 682). Petitioner was advised of his *Miranda* rights and his rights under Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831 (Tr. 682-683). Petitioner waived his rights and gave a sworn statement admitting his involvement in the sale of cocaine (GX 10).

The two agents testified that following the October 29, 1982, arrest and interview of petitioner, each of them dictated his report into a small, hand-held tape recorder. A secretary transcribed the tapes, converting them into typewritten final reports. The agents then erased the tapes and reused them (Tr. 735-737, 765-766).

At trial, the government provided petitioner's counsel with copies of the agents' typewritten reports. Counsel, however, insisted that under the Jencks Act, 18 U.S.C. 3500, the government was required to preserve and produce not only the final versions of the reports, but also the dictated tape recordings from which the reports were typed (Tr. 771). Because the government no longer had those tapes, counsel moved to strike the testimony of the two agents. The trial judge denied the motion (*ibid.*).

3. The Court of Military Appeals rejected petitioner's argument that the Jencks Act had been violated (Pet. App. 2a-4a). The court found no indication that there was any substantive difference between the Secretary's typed versions of the agents' reports and the typewritten reports signed by the agents (*id.* at 4a). The court also noted that the tapes would not reveal whether the agents had tailored their reports to fit their conclusions, because the agents could have shaped their accounts when they dictated their reports (*ibid.*). Accordingly, the court found it "difficult to visualize how [petitioner] would benefit from having both the taped and typed versions of the reports" (*ibid.*).[1]

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[1] Petitioner did not attempt to call the secretary who transcribed the tapes, even though production of the secretary would have been at government expense. Rule 703, *Manual for Courts-Martial, United States—1984.*

ARGUMENT

Petitioner contends (Pet. 4-8) that it was error for the government not to preserve and produce the tape recordings made by the two investigating agents, even though the government produced copies of the agents' final reports, which were taken directly from the tape recordings.

1. The Jencks Act, 18 U.S.C. 3500(b), requires the government to provide a defendant with any "statement" of the witness in the possession of the government that relates to the subject matter of the witness's testimony. A "statement," for purposes of the Jencks Act, includes a written statement made by the witness and signed or adopted by him, and a mechanical recording "or a transcription thereof, which is a substantially verbatim recital of an oral statement" made by the witness. 18 U.S.C. 3500(e)(2). In this case, petitioner received copies of the agents' final reports, which were transcriptions of their recorded accounts of their meeting with petitioner. The Court of Military Appeals correctly held that the production of the transcriptions of the recorded reports satisfied the Jencks Act, and that the Jencks Act did not require the government to preserve and produce the tape-recorded versions of the reports as well.

When an agent testifies as a witness at trial, any report the agent has prepared that relates to his testimony must be produced for the defense. The courts have uniformly held, however, that the government is not required to produce preliminary drafts of the agent's report. See *United States* v. *Ammar*, 714 F.2d 238, 258-259 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Soto*, 711 F.2d 1558, 1562 (11th Cir. 1983); *United States* v. *Bastanipour*, 697 F.2d 170, 174-175 (7th Cir.

1982), cert. denied, 460 U.S. 1091 (1983); *United States* v. *Bagnariol*, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Kaiser*, 660 F.2d 724, 731-732 (9th Cir. 1981), cert. denied, 455 U.S. 956 (1982); *United States* v. *Griffin*, 659 F.2d 932, 936-938 (9th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *United States* v. *Pacheco*, 489 F.2d 554, 566 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975). Relying on that consistent line of authority, the Court of Military Appeals correctly held that the agents' destruction of the tape-recorded "drafts" of their final reports in this case did not violate the Jencks Act.

In seeking to counter the authorities relied on by the Court of Military Appeals, petitioner invokes this Court's decision in *Clancy* v. *United States*, 365 U.S. 312 (1961). That decision, he argues, supports his claim that the tape-recorded "draft reports" in this case constituted Jencks Act "statements." The materials at issue in *Clancy*, however, were not drafts, but the final versions of the agents' reports, which were signed by the agents. See 365 U.S. at 314. Those reports, which were not given to the defendants in *Clancy*, were equivalent to the signed reports that *were* given to petitioner in this case. Petitioner's reliance on *Clancy* is therefore misplaced.

More instructive than the *Clancy* case is this Court's decision in *Killian* v. *United States*, 368 U.S. 231 (1961). There, the Court noted that the destruction of agents' notes does not necessarily violate the Jencks Act. The Court observed that "almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed." 368 U.S. at 242. The Court held that if the notes in that case were "made only for the purpose of transferring the data thereon [to a permanent document]

and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right" (*ibid.*). The facts described in *Killian* are essentially the facts of this case. The agents made the tape-recordings for the purpose of generating reports in a more permanent form. After the data had been transferred to the final reports, the tapes were destroyed in good faith and in accordance with the agents' normal practice (Pet. App. 2a). The destruction of the tapes therefore did not violate the Jencks Act.[2]

The court of appeals cases on which petitioner relies (Pet. 5 n.1) are not on point. Several of those cases involved written or recorded statements of witnesses that unequivocally fell within the definition of "statements" under the Jencks Act. See *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir.), cert. denied, 439 U.S. 928 (1978) (recording of extortion victim's conversations with the defendant); *United States* v. *Carrasco*, 537 F.2d 372, 375 (9th Cir. 1976) (informant's signed statements in diary form). The only issue in those cases was whether the government's failure to preserve the statements constituted reversible error. Other cases cited by petitioner in-

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[2] Although the "draft reports" in this case were in tape-recorded rather than in handwritten form, that should not make a difference in determining their status under the Jencks Act. There is no indication that the portion of the Jencks Act requiring the production of any "mechanical, electrical, or other recording" of a witness's oral statements (18 U.S.C. 3500(e)(2)) was intended to require the preservation and production of draft reports that would not be producible if they were in written form.

volved agents' notes of interviews with third-party witnesses who subsequently testified at trial. Because the verbatim remarks of a witness, as recorded contemporaneously in an agent's notes, are producible "statements," see 18 U.S.C. 3500(e)(2), the destruction of the notes or other recordings of the witness's statements can result in a violation of the Jencks Act. Some courts have therefore required that such notes be preserved. See, *e.g.*, *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Harrison*, 524 F.2d 421 (D.C. Cir. 1975).[3] Those cases, however, do not govern the question presented here—whether an agent's draft report constitutes a "statement" of the agent. Unlike the written or recorded words of a third-party witness, an agent's draft report is not a "statement," because a tentative draft is not the report that the agent adopts as his account of the reported events.

The Third Circuit noted this distinction in *United States* v. *Ammar*, 714 F.2d at 258-259, where it pointed out that an agent's contemporary rough notes of an interview made during the course of an investigation might fall within the Jencks Act, but rough drafts of the agent's final report ordinarily do not. The same distinction is drawn in *United States* v. *Carrasco*, *supra*, a case on which petitioner relies. There, the court noted that although a written statement by a third-party witness that is given to an agent is clearly a Jencks Act "statement," a rough draft from which an agent prepares his final report is not. 537 F.2d at 377. In such cases, the

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[3] *Holmes* v. *United States*, 271 F.2d 635 (4th Cir. 1959), on which petitioner also relies, is wholly inapposite. In that case, the government failed to produce even the agent's final report.

court noted, "[t]he benefits to defendants in those few cases in which revision produces substantial distortion may not justify the costs of retaining all rough notes in all cases" (*ibid.*).

2. Even if the tape-recorded versions of the agents' reports constitute "statements" within the meaning of the Jencks Act, petitioner's counsel was not prejudiced by the destruction of the tapes. As the Court of Military Appeals found, the tapes were transcribed "substantially verbatim" into the final typewritten reports (Pet. App. 4a). Petitioner's counsel therefore would have had no more impeachment material to work with if the tapes had been preserved. Accordingly, the failure to produce the tapes does not require reversal. *Rosenberg* v. *United States*, 360 U.S. 367 (1959).

Petitioner takes issue (Pet. 8-9) with the Court of Military Appeals' conclusion that the final reports were substantially verbatim transcriptions of the tape-recorded draft reports. In fact, however, the record supports the court's finding on that point. Both agents testified that they dictated their reports in lieu of preparing handwritten drafts (Tr. 735-737, 765-767), and both reviewed the typewritten reports made from the dictation tapes before signing them (GXs 10, 12; AX 4). As one of the agents explained, the final report was "exactly what I taped on the tape recorder" (Tr. 737). The other agent testified that his report was dictated on the tape recorder and then typed by a secretary, who prepared the final report based on the dictated version (Tr. 766). Although the second agent did not state that his final report was word-for-word the same as his tape-recorded version, the testimony of the two agents makes it clear that a secretary produced the final

reports directly from the tape-recorded versions. Under those circumstances, and absent any evidence to the contrary, the Court of Military Appeals was fully justified in concluding that there were "no indication whatsoever of substantive differences between the taped versions left with the secretary and the typewritten reports signed by the agents" (Pet. App. 4a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40118